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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-473

DANIEL T. TAYLOR, III,

Petitioner,

—v.—

JOHN P. HAYES, Judge, Jefferson Circuit Court, Criminal Branch, Second Division,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

BRIEF *AMICUS CURIAE* ON BEHALF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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BRIEF *AMICUS CURIAE* ON BEHALF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

The Association of the Bar of the City of New York files this brief pursuant to Rule 42 of the United States Supreme Court. Both Petitioner and Respondent have consented to the filing of this brief and copies of the consents of Petitioner and Respondent have been filed with the Clerk of this Court.

Interest of the *Amicus Curiae*

The Association of the Bar of the City of New York ("The Association") has a membership of 10,200 attorneys admitted to practice in New York and elsewhere. The Association was established by Act of the New York State

Legislature in 1871. Laws 1871, Chapter 819; Amended Laws 1924, Chapter 134. Its stated statutory purposes are "cultivating the science of jurisprudence, promoting reforms in the law, facilitating the administration of justice, elevating the standard of integrity, honor and courtesy in the legal profession and cherishing the spirit of brotherhood among the members thereof."

In 1970, the Association appointed a Special Committee on Courtroom Conduct to study and report on the extent and causes of courtroom disorder which were of such wide concern at the time and to suggest how the judicial system and the legal profession might deal with these problems. Ten members of the Association were appointed to the Committee (one later resigned because of the press of other business). Burke Marshall, former Assistant Attorney General and now Professor of Law at the Yale Law School, acted as Chairman. Other members included a former New York Court of Appeals judge, a former President of the City Bar Association, a law school dean and a present sitting federal judge.

The Committee and its staff worked for two and one-half years on its study. Four consultants prepared special papers, and many persons with expertise and first-hand knowledge of the problem appeared before the Committee. Other experts on different phases of the problem were interviewed. A detailed questionnaire on courtroom disorder was sent to every trial judge of general jurisdiction in the nation (over 4,600) and 1,602 responded. Questionnaires were also sent to every United States Attorney, the district attorneys of the seventy largest jurisdictions, the Attorneys General of every state, and the presidents of the

eighty-nine largest bar associations in the nation.* Every published case of courtroom disorder was analyzed.

The Committee has recently published its final report under the title DISORDER IN THE COURT which contains its analysis of the problems and its suggestions for remedial action to preserve orderly judicial procedures and the integrity of the courtroom. The Association believes that the Committee's findings and conclusions may be helpful to the Court in determining the legal issues presented on this appeal.

Statement of the Case

Amicus incorporates the statement of the case as outlined by the Petitioner.

Summary of Argument

I.

The courts must have effective sanctions for protecting themselves against disruption of their proceedings. However, the summary contempt power is so inconsistent with the requirements of due process that it should no longer be used to maintain order in the court. In recognition of

* The questionnaire returns indicated that courtroom disorder was not a serious quantitative problem in American courts. Of the 1,602 judges who responded only 107 reported that they had experienced a total of 112 cases of trial disruption in their entire lives on the bench. Similar conclusions were drawn by the United States Attorneys, district attorneys, Attorney Generals and bar association presidents. Where disorder did occur, defendants were primarily responsible. Lawyers accounted for a very small proportion of courtroom disruption. See N. Dorsen and L. Friedman, DISORDER IN THE COURT, Report of the Association of the Bar of the City of New York, Special Committee on Courtroom Conduct (hereinafter "DISORDER IN THE COURT") 5-7, 268-332 (1973).

the abuses of the summary contempt power, this Court has greatly circumscribed its use in recent years. A sentence greater than six months can no longer be imposed, judges who are personally embroiled with an alleged contemnor cannot impose punishment upon him, and judges who have been insulted by a defendant cannot wait until the end of trial to hold him in contempt.

However, these restrictions are not enough. Time and time again judges have imposed severe and arbitrary punishment on defendants and lawyers in summary contempt proceedings. This has been done not only when an alleged contempt was considered a direct insult to the court or the judge, but also when a lawyer merely engages in vigorous advocacy. Too often a judge merely seeks retribution after a dispute with a party. The need for an impartial tribunal to hear a contempt requires that all contempts be heard by someone who is not acting as prosecutor of the charges.

The summary contempt power is not necessary to maintain order in the court. Under *Illinois* v. *Allen,* 397 U.S. 337 (1970) a trial judge may cite a defendant for contempt (to be heard later by another judge), remove him from the courtroom, or bind or gag him. These are effective, immediate sanctions to protect the ongoing proceedings of the court. A lawyer may also be cited for contempt (to be heard after the trial by another judge) and he faces the possibility of suspension and disbarment. Thus, summary contempt is not necessary to deter lawyers from misbehaving in court. Respect for the courts is engendered not by the fear of unlimited authority but by fair, due process procedures.

II.

Even if this Court does not find that summary contempt per se violates the due process clause, it must still reverse the judgment below since (1) the judge was personally embroiled with the petitioner; (2) the 54 month sentence originally imposed was a recognition of the seriousness of the offense which, therefore, required a jury trial; and (3) a proper hearing was not afforded the petitioner.

ARGUMENT

POINT I

The summary criminal contempt power violates the due process clause of the Fourteenth Amendment.

We start with the proposition that orderly justice is an absolute prerequisite for a functioning democracy. The courts are perhaps the most important protection of the rights of the citizens, but they cannot perform that function in an atmosphere of disorder, uproar or turmoil. The courts simply must have efficient sanctions for protecting themselves against disruption of their procedures. Justice Brennan has written:

> Constitutional power to bring an accused to trial is fundamental to a scheme of "ordered liberty" and prerequisite to social justice and peace . . . [the nation] cannot endure if in individual cases the claims of social peace and order on the one side and of personal liberty on the other cannot be mutually resolved in the forum designated by the Constitution. If that resolution cannot be reached by judicial trial in a court of law, it

> will be reached elsewhere and by other means, and there will be grave danger that liberty, equality and the order essential to both will be lost. *Illinois* v. *Allen*, 397 U.S. 337, 347, 348 (1970) (Brennan, J. concurring).

However, this does not mean that courts may impose sanctions for courtroom misconduct in a manner contrary to the basic principles which the courts are designed to protect. It would be anomalous to say that while the courts must afford due process of law to all those who come before them, they can deny that same due process to those who in any way threaten the order of the courtroom. The basic due process requirements of notice, hearing, an unbiased judge and a jury trial where appropriate cannot be dispensed with because the offense involved is labeled contempt of court.

A. *The Summary Contempt Power Contains Great Opportunities for Abuse and Has Been Severely Circumscribed in Recent Years.*

This Court has often spoken about the dangers of the summary contempt power. The Court wrote in *In re Michael*, 326 U.S. 224, 227 (1945) that federal courts, in contempt cases, must be limited "to 'the least possible power adequate to the end proposed.' *Anderson* v. *Dunn*, 6 Wheat. 204, 231. The exercise by federal courts of any broader contempt power than this would permit too great inroads on the procedural safeguards of the Bill of Rights."* In

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* This Court has not made any distinction in reviewing summary contempt procedures of state and federal courts and has imposed the same due process requirements on both. Compare *In re McConnell*, 370 U.S. 230 (1962) and *In re Little*, 404 U.S. 553 (1972). This Court said in *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465 (1971): "Whether the trial be federal or state, the concern of due process is with the fair administration of justice."

the case of *In re McConnell,* 370 U.S. 230, 236 (1962) this Court said: "To preserve the kind of trials that our system envisages, Congress has limited the summary contempt power vested in courts to the least possible power adequate to prevent actual obstruction of justice."

Anticipating this Court's decision in *Bloom* v. *Illinois,* 391 U.S. 194 (1968), Justice Black wrote in dissent in *Green* v. *United States,* 356 U.S. 165, 193-94 (1958):

> The power of a judge to inflict punishment for criminal contempt by means of a summary proceeding stands as an anomaly in the law . . . [This] power . . . has aptly been characterized by a State Supreme Court as "perhaps, nearest akin to despotic power of any power existing under our form of government." [citing State ex rel. Ashbaugh v. Circuit Court, 97 Wis. 1, 8, 72 N.W. 193, 194-95.] Even though this extraordinary authority first slipped into the law as a very limited and insignificant thing, it has relentlessly swollen, at the hands of not unwilling judges, until it has become a drastic and pervasive mode of administering criminal justice usurping our regular constitutional methods of trying those charged with offenses against society.

Justice Black pointed out that the essential vice of the summary contempt power is that it enables a judge to combine in one person a variety of functions in a criminal case.

> When the responsibilities of lawmaker, prosecutor, judge, jury and disciplinarian are thrust upon a judge, he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartially

> on the guilt or innocence of the accused. He truly becomes the judge of his own cause. The defendant charged with criminal contempt is thus denied what I had always thought to be an indispensable element of due process of law—an objective, scrupulously impartial tribunal to determine whether he is guilty or innocent of the charges filed against him. . . . "To this end no man can be a judge in his case and no man is permitted to try cases where he has an interest in the outcome . . . Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." 356 U.S. at 199.

This position was followed by this Court in *Bloom* v. *Illinois*, 391 U.S. 194 (1968). The Court held that serious criminal contempt cases were subject to the jury trial provisions of the Sixth Amendment as applied to the states through the Fourteenth Amendment. The Court noted "the potential for abuse which resides in the summary power to punish for contempt." 391 U.S. at 204. It pointed out the many ways in which courts and legislatures had "eroded the power of judges to try contempts of their own authority." 391 U.S. at 207. The Court held:

> Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. . . . Given that criminal contempt is a crime in every fundamental respect, the question is whether it is a crime to which the jury trial provisions of the Constitution apply. . . . We hold that it is, primarily because in terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial dif-

ference between serious contempts and other serious crimes. Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court. 391 U.S. at 201-202.

Bloom established that any sentence in excess of six months cannot be imposed for any contempt by a state or federal court without the intervention of a jury. In a series of other cases, however, the Court also imposed additional restrictions on the power of a trial judge to sentence through summary contempt procedures. In *Offutt* v. *United States,* 348 U.S. 11, 17 (1954) the Court held that a trial judge who becomes "personally embroiled" with an alleged contemnor cannot hold him in contempt even though the sentence was only ten days. In *In re McConnell,* 370 U.S. 230 (1962) the Court held that no contempt may be punished unless there is an actual obstruction of justice. In *Panico* v. *United States,* 375 U.S. 29 (1963) the Court held that a summary contempt proceeding was inappropriate for an alleged contemnor who showed indications of mental illness. In *Holt* v. *Virginia,* 381 U.S. 131 (1965) the Court reversed a summary contempt fine of only $50 imposed upon a lawyer for filing a vigorously-worded motion for change of venue which charged the trial judge with bias. In *Harris* v. *United States,* 382 U.S. 162 (1965) the Court

established that summary contempt was not available as a sanction against a grand jury witness who refused to answer questions put to him by the grand jury and who repeated his refusal after being brought before a federal judge. A district court could impose punishment only through a full due process hearing under rule 42(b) of the Federal Rules of Criminal Proceduce.

This Court imposed a new rule for summary contempts in *Mayberry* v. *Pennsylvania*, 400 U.S. 455 (1971). In that case a pro se defendant had cruelly and continuously insulted the trial judge throughout the proceedings. After the verdict, the judge held the defendant in contempt and sentenced him to a term of 11 to 22 years for these contempts. This Court reversed. It held that where a judge "does not act the instant the contempt is committed, but waits until the end of the trial, on balance, it is generally wise where the marks of the unseemly conduct have left personal stings to ask a fellow judge to take his place. . . . [A] judge, vilified as this Pennsylvania judge, necessarily becomes embroiled in a running, bitter controversy. No one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." 400 U.S. at 463, 464, 465.

In its most recent cases on the subject, the Court reversed a summary contempt sentence in *Johnson* v. *Mississippi*, 403 U.S. 212 (1971) since it was not clear that the trial judge had personally observed the action which served as the basis for the contempt citation. There was also evidence of bias by the judge. "Trial before 'an unbiased judge' is essential to due process." 403 U.S. at 216. In *In re Little*, 404 U.S. 553 (1972) this Court unanimously reversed a summary contempt conviction imposed by a state court

after a pro se defendant had accused the judge of prejudice against him.

Many lower federal courts have followed this Court's lead and have imposed greater restrictions on the summary contempt power. In *United States* v. *Marra*, 482 F.2d 1196 (2d Cir. 1973) the Second Circuit held that a witness could not be punished summarily by contempt for refusing to answer a question put to him during a criminal trial in the presence of a jury. In *United States* v. *Meyer*, 462 F.2d 827, 845 (D.C. Cir. 1972), the District of Columbia Circuit held an alleged contempt "which consists of an impugnation of the integrity and impartiality of the trial judge is sufficiently personal to invoke the *Mayberry* doctrine." In such a case a defendant "is entitled to have the contempts charged against him adjudicated in a full hearing before a different judge." In *United States* v. *Seale*, 461 F.2d 345 (7th Cir. 1972) the Seventh Circuit held that a trial judge cannot hold a person in summary contempt after the declaration of a mistrial. The Court also held that "where the judge waits to act until a mistrial or the end of a trial, consecutively imposed sentences for contemptuous conduct occurring during the course of the preceding trial must be cumulated to determine the defendant-contemnor's right to a jury trial." 461 F.2d at 356. If the total is more than six months, a jury trial is necessary. In *In re Dellinger*, 461 F.2d 389 (7th Cir. 1972) the Seventh Circuit held that the *Mayberry* rule applies as well to lawyers as to defendants who commit a contempt. And in *Grizzell* v. *Wainwright*, 481 F.2d 405 (5th Cir. 1973) the Fifth Circuit held that *Mayberry* should be given retroactive application. See also *Weiss* v. *Burr*, 484 F.2d 973 (9th Cir. 1973); *United States ex rel. Robson* v. *Oliver*, 470 F.2d 10 (7th Cir. 1972); *United*

States v. *Wilson and Bryant*, —— F.2d —— (2d Cir. November 28, 1973).

State courts have also re-examined the summary contempt power and imposed restrictions on its use. The Supreme Court of Alaska held in *State* v. *Browder*, —— Alaska ——, 486 P.2d 925 (1971) that in any criminal proceeding (including contempt) which may lead to incarceration, a defendant is entitled to a jury trial.

> We hold that direct criminal contempts must be treated like any other criminal prosecution for purposes of the right to jury trial under article I, section 11 of the Alaska Constitution. . . . it is clear that a criminal contempt proceeding is criminal prosecution within article I, section 11 of the Alaska Constitution. In the instant case, we believe that considerations of convenience and expediency to the state are convincingly outweighed by the right of an individual to be convicted only by means which are fundamentally fair. We therefore hold . . . that article I, section 11 of the Alaska Constitution guarantees the accused the right to jury trial for a direct criminal contempt. 486 P.2d at 973.

In summary, as a matter of federal constitutional law, the power of summary contempt has been restricted as follows:

1. Under *Bloom*, no sentence of greater than six months can be imposed for contempt without a jury.

2. Under *Offutt*, no judge who is personally embroiled with the alleged contemnor can sentence him for contempt.

3. Under *Mayberry*, a judge who is insulted or abused by a defendant cannot wait until the end of the trial to sentence for contempt.

4. Under *Meyer* and *Dellinger*, the *Mayberry* rule applies to lawyers as well as defendants.

5. Under *Seale*, consecutively imposed sentences for contempt handed down at the end of a trial must be cumulated to determine the right to a jury trial.

B. *The Potential for Abuse in Summary Contempt Proceedings Has in Fact Been Realised.*

This Court emphasized in *Bloom* the potential for abuse that is present in summary contempt proceedings. In fact these abuses have often occurred. Time and time again judges have imposed severe and arbitrary punishment on defendants and lawyers. As noted earlier, the defendant in the *Mayberry* case received a sentence of eleven to twenty-two years. No matter how outrageous the defendant's words were in court, that sentence imposed by the judge who was their target is excessive. In the present case petitioner Taylor was originally sentenced by the trial judge to four-and-a-half years for contempt (later reduced to three-and-a-half years) for his actions in defending the murder case of two black youths. The judge's comments show quite clearly that he felt personally affronted by what occurred in his courtroom.

Even when an alleged contempt was not "a direct insult to the court or the judge," but consisted of vigorous advocacy or dispute of the court's rulings, a judge may view the action as a "rejection of judicial authority or an interference with the judicial process." *Bloom* v. *Illinois*, 391

U.S. at 202. After a dispute with a lawyer, judges will often be "seeking retribution" rather than impartially applying the law. *Sacher* v. *United States,* 343 U.S. 1, 37 (1952) (Frankfurter, J. dissenting).

In its final report, the Special Committee on Courtroom Conduct analyzed the published cases of summary contempt from 1960 to 1972. It found that of a total of seventy-two cases where the trial judge imposed summary punishment, forty (more than sixty percent), were later reversed by an appeals court. See DISORDER IN THE COURT, pp. 233-234.

In many of these cases, the arbitrariness of the judge's action is obvious. In a case involving members of the S.D.S. in Chicago, the judge held all sixteen defendants in contempt for laughing at one of his questions ("Who is in charge of the S.D.S.?") and sentenced them to ten days in jail. The sentences were reversed on appeal. *People* v. *Tomashevsky—Appeal of Boudin,* 48 Ill. 2d 559, 273 N.E. 2d 398 (1971). In another Illinois case, the following colloquy took place:

> The Court: There will be a fine of $50 and $5 court costs.
>
> Mr. Tecza: Is there any way I can appeal this decision. It is horribly unjust.
>
> The Court: Maybe I should raise the fine. We will make the fine $85 and $5.
>
> Mr. Tecza: Fine. On what basis are you raising it?
>
> The Court: Contempt. *People* v. *Tecza,* 4 Ill. App. 2d 1058, 283 N.E. 2d 111, 113 (1972).

The need for an impartial judge to pass upon alleged contempts is also shown by the cases in which contempt

sentences are reversed or greatly reduced by a second judge reviewing the same record. In *United States* v. *Meyer*, 462 F. 2d 877 (D.C. Cir. 1972) a lawyer was held in contempt and sentenced to 30 days in jail for making disrespectful remarks to the judge. On remand before another judge, the case was dismissed since there was no obstruction of the administration of justice. 346 F. Supp. 973 (D.D.C. 1972). In the *Dellinger* case discussed above, the original trial judge had found 10 separate defendants guilty of 173 contempt specifications and sentenced them to a total of 16 years 30 months and 106 days in jail. After appeal and remand, only 4 defendants were found guilty of a total of 13 specifications and no sentence of imprisonment was imposed. *In re Dellinger*, 72 Cr. 925 (N.D. Ill. December 6, 1973) (Gignoux, J.).

An examination of the cases showing use of the summary contempt power indicates that, as Justice Black said in *Green*, " 'prosecuting judges [should never] be trial judges of the charges they prefer.' " 356 U.S. at 199. This is just as true in cases where a sentence of less than six months is imposed. In all contempt cases the need for an impartial judge is clear. As this Court said in *Bloom*: "Indeed, in contempt cases an even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power." 391 U.S. at 202.

Even if a trial judge acts instantly during the trial to hold a person in contempt (with sentence to be pronounced on the spot or at the end of the trial), this does not meet the due process problem mentioned above. The judge is just as likely (if not more so) to act arbitrarily, if he must do so on the spot. As this Court said in *Sacher* v. *United*

States, 343 U.S. 1, 11 (1952), "[if] we were to hold that summary punishment can be imposed only instantly upon the event, it would be an incentive to pronounce, while smarting under the irritation of the contemptuous act, what should be a well-considered judgment." A trial judge who attempts to hear his own contempt charges cannot, in the nature of things, be the "neutral and detached" officer required by due process. *Ward* v. *Village of Monroeville,* 409 U.S. 57, 62 (1972).

The only possible justification for requiring a different rule for summary contempts during a trial is that such power is necessary to maintain order as the trial proceeds. As Justice Frankfurter said in dissent in the *Sacher* case:

> Summary punishment of contempt is concededly an exception to the requirements of Due Process. Necessity dictates the departure. Necessity must bound its limits. 343 U.S. at 36.

The necessity for summary contempt will be examined in the following section.

C. *The Summary Contempt Power Is Not Necessary to Maintain Order in the Court.*

In reaching its conclusion that the summary contempt power should be done away with, *Amicus* has not ignored the justifications that have been offered for it. The most important of these is that trial judges require such authority to maintain order in the court. Everyone recognizes the importance of a tranquil courtroom to assure the proper administration of justice, but summary power is not necessary to achieve this end. As Justice Frankfurter said, dissenting in *Sacher*:

> [The] administration of justice and courts as its instruments are vindicated, and lawyers who might be tempted to try similar tactics are amply deterred, by the assurance that punishment will be certain and severe regardless of the tribunal that imposes it. 343 U.S. at 37.

This Court has afforded trial judges ample power to deal with contemptuous behavior. As far as defendants are concerned, *Illinois* v. *Allen*, 397 U.S. 337 (1970) has granted trial judges a variety of weapons to meet misconduct. A trial judge can act with escalating steps against a defendant —by warning, removal, binding and gagging, or a citation for contempt. A defendant who has been cited knows that after trial he will be subject to a hearing and possible conviction and punishment, which should be sufficient to deter him from wayward action and to enable a judge to control his courtroom. Whatever additional "flexibility" the summary contempt power may provide is outweighed by the significant objections to it.

To the argument that immediate action is necessary to deter others from attempting similar conduct which might abort the trial, the prompt citation of a defendant or other misbehaving person for contempt is "immediate action." The threat of a later criminal trial, with the possibility of a conviction and severe penalties, is a sufficient deterrent against further disobedience within the court.

As far as lawyers are concerned, the same considerations apply. A lawyer cited for contempt faces not only the possibility of subsequent trial and conviction, but the likelihood of professional discipline as well, in the form of censure, suspension or disbarment. Some judges have

found it expedient to impose civil contempt sanctions (not to exceed overnight incarceration) during the trial to keep proceedings moving. See DISORDER IN THE COURT, 102-105, 158-159. In extreme cases, the power to remove a lawyer from a case has been exercised, *Laughlin* v. *Eicher*, 145 F. 2d 700 (D.C. Cir. 1944). In view of the limited amount of lawyer misconduct found by the Special Committee, those sanctions should be more than enough to deter misconduct by a lawyer. See DISORDER IN THE COURT, 131-132.

It is often said that the summary contempt power is needed for swift imposition of penalties. If a second contempt hearing before another judge is required, a long period may elapse. In addition, the second hearing may have to be long and complicated, thus adding to the delay in reaching a final decision. This is true, but this alone does not justify the extraordinary power to punish summarily. All criminal trials involve some delay, and the delay incident to a full contempt hearing is no more dangerous to the administration of justice than the delays incident to the procedural steps required by the Bill of Rights. Procedural safeguards in the legal process always make a criminal trial more complicated and costly than arbitrary arrest and punishment would be. As Justice Black said in the *Green* case:

> It is undoubtedly true that a judge can dispose of charges of criminal contempt faster and cheaper than a jury. But such trifling economies as may result have not generally been thought sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom and other basic human rights of incalculable value. Cheap, easy convictions were not the primary concern of those who adopted the Constitu-

tion and Bill of Rights. Every procedural safeguard they established purposely made it more difficult for the Government to convict those it accused of crimes. On their scale of values justice occupied at least as high a position as economy. 356 U.S. at 216.

It is also important to lay to rest the suggestion that a later hearing is unnecessary because the trial judge "has already witnessed directly" the events leading to the contempt citation. This point has been met very well by an analysis in the *Wisconsin Law Review*:

> The existence of eyewitness testimony, even if uncontroverted, has never been considered grounds for abandonment of due process of law. If due process is to mean anything at all, it must mean that guilt may not be presumed, but must be proven. To hold otherwise is to say that when guilt is certain, proof is superfluous. But a legal system which operates according to such tautologies plants the very seeds of despotism, which due process of law seeks to destroy. Note, "Criminal Law—Contempt—Conduct of Attorney During Course of Trial," 1971 Wisc. L. Rev. 329, 347.

Furthermore, since it is clear that a judge can often become personally embroiled or that personal stings may have left their marks, one can no longer assume that the trial judge has dispassionately and clearly viewed what occurred at the trial. Once it is recognized that due process requires an unbiased judge to determine guilt and punishment, the argument that it is "unnecessary" to have a separate hearing loses its force.

A further argument in favor of summary contempt is that appellate review may cure any defect in the summary proceeding. But there are serious shortcomings in appellate review. The appellate court reviewing a summary contempt hearing can decide only on the basis of the original record. If there is a claim of bias or personal embroilment, a defendant should have the right to offer supporting evidence to show that he was not guilty of obstructing the trial. This can be done in a separate due process hearing before another judge but not on appellate review.

Any attempt to abolish the summary contempt power will be met with the claim that it is necessary to maintain respect for and discipline in the courts. The same argument was made when restrictions were placed on the ability of courts to punish printed criticism of court action or to punish conduct outside the courtroom by a term longer than six months. These claims were not justified in the earlier cases, and we do not think they are justified here. As this Court said in *Bloom* v. *Illinois,* 391 U.S. at 208, "Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries."

It is interesting to note that many European countries do not permit a trial judge to impose sentences as long as six months for contempt. They generally grant a judge power to remove any person creating disorder in the court. If the person forcibly resists an order to leave the court, greater penalties are possible. See DISORDER IN THE COURT, 238, n. 70.

Courts and legislatures have come to recognize the abuse of summary contempt power. As noted above, the State of Alaska has eliminated summary contempt by judicial decision. In 1971 the State of Connecticut passed a law requiring a different judge to pass on all contempt charges. Connecticut Public Act No. 779 (1971). Kentucky itself (in Kentucky Rev. Stat. 432.260) placed a limit of 30 hours imprisonment for contempt if a judge imposes sentence without a jury. However, the court below held that limitation to be unconstitutional since it interfered with the administration of justice! By the same token, every right in the Bill of Rights "materially interferes with the administration of justice" since it makes punishment more difficult.

As a judge of the Pennsylvania Supreme Court has written:

> Why should we allow a judge or (Justice) to have a special privilege when the judicial function is allegedly obstructed? There is constitutional silence concerning any special judicial privilege which permits the judicial branch to deprive a person of constitutional rights because a member of the judicial branch is involved. Punishment for contempt of court without constitutional protections *that exist for all other crimes* is nothing more than the exercise of raw judicial power. It is not the exercise of constitutional judicial authority. . . . *The obstruction of justice,* in any way, at any time, by any person, *is a serious offense.* We have, however, other workable procedures to prevent disruptions in the courtroom. We do not need a special privilege for judges which dispenses with constitutional safeguards. *Commonwealth* v. *Patterson,* —— Pa. ——, 308 A. 2d 90, 95 (1973) (Manderino, J. dissenting).

The time has come to eliminate this most serious and unnecessary anomaly in the administration of justice.

POINT II

The trial judge below was required to refer the contempt proceedings to another judge for a full due process hearing.

Even if this Court does not find that summary contempt per se violates the due process clause, it must still reverse the judgment below. Under existing precedents of the Court, there were so many violations of proper procedures that the conviction cannot stand. These include the fact that (1) the judge was personally embroiled with the alleged contemnor; (2) the four-and-a-half year sentence originally imposed was a recognition of the seriousness of the offense which, therefore, required a jury trial; and (3) a proper hearing was not afforded the petitioner.

A. *The Trial Judge Could Not Impartially Sit in Judgment of the Contempt Charges Against Petitioner.*

As noted above, *Offutt* v. *United States,* 348 U.S. 11 (1954) established the proposition that a judge who becomes personally embroiled with the alleged contemnor cannot sit in judgment of the contempt charges. *Mayberry* went further and said that if a judge has been the victim of a personal attack, he must refer any contempt charges to another judge. If there is evidence of bias, *Johnson* v. *Mississippi,* 403 U.S. 212 (1971) requires that the matter be heard by a second judge.

In the instant case, there is overwhelming evidence of the judge's personal animus against the petitioner. Peti-

tioner in his main brief cites numerous instances in which the judge cast aspersions on his character or motives. During the voir dire, the trial judge interrupted the petitioner's examination of a prospective juror and stated that he was going to take it over, saying to the petitioner: "I think you're putting on a show. That's my opinion" (Tr. 348). During a discussion in chambers about wrangling between attorneys, he stated in reference to the petitioner: " . . . you all were talking and I can't blame the guy too much for that, but on the other hand, he is getting away from the questions and knowing him, if you give him an inch, he'll take a mile. I might as well sit on him right now" (Tr. 546). In another interchange the trial judge again insisted on indulging in personalities and baiting the petitioner:

> Mr. Taylor: Does Your Honor understand that my purpose is to defend my case?
>
> The Court: I think that's probably what you're here for, I'm not sure (Tr. 1364).

And in still another interchange when the petitioner attempted to explain his basis for making an objection:

> Mr. Taylor: The objection is that he uses the word "also" as inferring that he's got these great confessions.
>
> The Court: Don't go through all those configurations and put on an act (Tr. 1860).

At a later point, the following exchange occurred:

> Mr. Taylor: Thank you. Now, may I say, additionally, I have serious doubts as to the legal correctness of the order and since we have, I have, I don't know,

five months of my life wrapped up in this case, and maybe more than that—

The Court: (interrupting) Before it's over, you might have a lot more than that (Tr. 1957).

Just before the trial judge below passed sentence he made the following comments about the petitioner:

The Court: I've for two weeks sit here and listen to you (sic). Now, you're going to listen to me. Stand right here, sir.

For two weeks I've seen you put on the worst display I've ever seen an attorney in my two years in this court and 15 years of practicing law. You've quoted that you couldn't do it any other way. You know our court system is completely based upon, particularly criminal law, the Doctrine of Reasonable Doubt. That's exactly what it means, reason.

It doesn't mean that it's based upon deceit; it doesn't mean that it's based upon trickery; it doesn't mean that it's based upon planned confusion.

Sometimes I wonder really what your motive is, if you're really interested in the justice of your client, or if you have some ulterior motive, if you're interested in Dan Taylor or Narvel Tinsley.

It's a shame that this court has to do something that the Bar Association of this State should have done a long time ago.

As far as a lawyer is concerned, you're not. I want the jury to hear this; I want the law students of this community to hear this, that you're not the rule, you're the exception to the rule—

Mr. Taylor: (Interrupting) Thank you.

The Court: I want them to understand that your actions should not be their actions because this is not the way that a court is conducted. This is not the way an officer of a court should conduct itself (sic). 494 S.W. 2d at 742.

It should be noted that these comments were very similar to those made by the trial judge in *Offutt* which, according to this Court, showed "personal embroilment" on his part. 348 U.S. at 16, 17.

However one views the frequent encounters between the parties and however one attributes blame for them, there was clearly an adversary posture between petitioner and the trial judge throughout the proceedings. There was nothing subtle, hidden or uncertain about the judge's animosity toward petitioner. In addition to the exchanges quoted above and in petitioner's brief, the judge originally sentenced petitioner to 54 months in jail for nine counts of contempt. On two counts the sentence was one year which was later amended to six months each. The trial judge also suspended petitioner from practicing in his court ever again. (This order was reversed by the Kentucky Court of Appeals.) It would be difficult to find more blatant examples or more concrete evidence of personal involvement by a judge than is found in the instant case.

The Court of Appeals said in *United States* v. *Meyer*, 462 F.2d 827, 841 (D.C. Cir. 1972) that "when the judge adopts an adversary posture with respect to the alleged contemnor," referral to an impartial judge is necessary. That situation is clearly present here. For that reason alone the conviction below must be reversed.

B. *Petitioner Was Entitled to a Jury Trial Because of the Seriousness of the Offense With Which He Was Charged.*

There are only two ways in which to view the fifty-four month sentence originally imposed on the petitioner by the trial judge. It could have been a reflection of the personal animosity of the trial judge toward the petitioner, in which case referral to another judge was required by *Offutt* and *Mayberry*. Or, assuming for the moment that the sentence was the result of sober consideration and dispassionate judicial reasoning, it was a reflection of the seriousness of the offense with which petitioner was charged. In the latter case, the charges should have been heard by a jury.

This Court held in *Duncan* v. *Louisiana,* 391 U.S. 145 (1968) that trial by jury was fundamental to the American scheme of justice and that the Sixth Amendment guarantee of jury trial was applicable to the states through the Fourteenth Amendment. " . . . a general grant of jury trial for serious offenses is a fundamental right." 391 U.S. at 157-158. The Court held that trial of simple battery under state law required a jury trial since the maximum penalty possible was two years, even though the defendant in that case had only been sentenced to 60 days in jail. "The penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgments' . . . of the crime in question." 391 U.S. at 160. Thus if the maximum penalty for an offense exceeds six months, a jury trial is necessary.

Where contempt is involved and no maximum penalty is fixed by statute, different calculations apply. This Court held in *Frank* v. *United States,* 395 U.S. 147, 149 (1969):

> In ordinary criminal prosecutions, the severity of the penalty authorized, not the penalty actually imposed,

is the relevant criterion. In such cases, the legislature has included within the definition of the crime itself a judgment about the seriousness of the offense. See *Duncan* v. *Louisiana*, ... But a person may be found in contempt of court for a great many different types of offenses, ranging from disrespect for the court to acts otherwise criminal. Congress, perhaps in recognition of the scope of criminal contempt, has authorized courts to impose penalties but has not placed any specific limits on their discretion; it has not categorized contempts "serious" or "petty." 18 U.S.C. §§ 401, 402. Accordingly, this Court has held that in prosecutions for criminal contempt where no maximum penalty is authorized, the severity of the penalty actually imposed is the best indication of the seriousness of the particular offense.

In *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966) this Court approved a six month sentence for criminal contempt imposed by a federal court of appeals for violation of its order. But this Court's holding in *Frank* and in *Cheff* v. *Schnackenberg* cannot mean that a serious contempt may be tried and punished by a judge alone without a jury if eventually, some appellate court will reduce the sentence to six months. This Court emphasized in *Frank* that there must be "objective indications of the seriousness with which society regards an offense." 395 U.S. at 148. These "objective indications" cannot be disregarded or overcome by an appellate court retroactively imposing a six month sentence.

In *Bloom* v. *Illinois*, 391 U.S. 194 (1968) the defendant was sentenced to 24 months in jail for criminal contempt by

a judge sitting without a jury. It was clear that the Illinois courts thought that the offense involved was a serious one. However, this Court did not attempt to undermine the right to a jury trial by retroactively reducing the two year sentence to six months. If appellate courts are permitted to deprive a defendant of the right to jury trial by reducing every contempt sentence to six months, this Court's holding in *Bloom* that serious contempts must be tried by a jury becomes meaningless. It can easily be evaded in every case through the device used by the Kentucky court below.

The correct rule must be that some contempts are so serious that jury trial is required under the Fourteenth Amendment. The seriousness of the offense is not determined only by what an appellate court later decides about the sentence. There is nothing in the opinions below that indicated that either the trial judge or the Kentucky Court of Appeals thought that petitioner's actions in court were not serious offenses. Indeed, strong condemnation of petitioner's deeds pervade the opinions below. The Kentucky Court of Appeals said:

> We have examined the entire record of the Tinsley trial, and it becomes immediately apparent that even before the trial had "gotten off the ground, so to speak," Taylor had embarked upon a plan or program designed to disrupt the trial and by any means possible cause the trial court to commit trial errors which might form the basis of an appeal. His actions were such as to clearly illustrate that they were deliberate, delaying, or planned disruptive tactics which did in fact create such an atmosphere in the court that he, if permitted to continue, would have appeared to be the star performer in the center ring of a three-ring circus. He

constantly harassed the court by innumerable objections, statements, and requests for conferences in chambers, and, in truth, the record indicates that a great percentage of the trial time was consumed by the court and counsel attending speeches made by Taylor in the court's chambers. 494 S.W.2d at 740.

The seriousness of the offense, for the purpose of determining the right to a jury trial, must be determined by objective criteria before or during the trial. In *United States* v. *Seale*, 461 F.2d 345, 356 (7th Cir. 1972) the Seventh Circuit held that on remand of the contempt charges in that case, "If the judge to whom this case is referred for trial decides that the outside limit of a sentence for Seale should be six months maximum including cumulation, that would obviate the necessity of having a jury on the remand." In this way the Court of Appeals eliminated the uncertainty whether a jury was necessary or not.

In cases where contempt citations are imposed during the trial, the penalty actually imposed by the trial court is the most reliable, objective criterion to determine the right to a jury trial. Certainly the sentence by, and the comments of, the trial judge below were a forceful declaration of how serious the offense was considered. It can well be argued that any criminal contempt involving courtroom misconduct is serious enough to warrant jury trial. If the offense has been regarded as so serious that it justifies immediate summary action, it is serious enough to trigger the jury trial requirement of the Fourteenth Amendment.

C. *A Proper Hearing Was Not Afforded the Petitioner Below.*

Many decisions of this Court have emphasized the need for a hearing before any punishment may be inflicted or any rights or benefit lost. "[W]e have stated time and time again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence.'" *Groppi* v. *Leslie,* 404 U.S. 496, 502 (1972). In *Mullane* v. *Central Hanover Trust Co.,* 339 U.S. 306, 313 (1950), the Court stated:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

In the instant case no appropriate hearing was afforded the petitioner before the trial judge held him in contempt and sentenced him to 54 months in jail. During the trial the judge informed petitioner nine separate times that he was in contempt. On each count either the judge would not let him respond for the record or a discussion of a substantive issue would ensue. After the verdict was rendered in the trial, the judge called the petitioner before the bar and told him that he had put on "the worst display I've ever seen an attorney" engage in. He made other disparaging remarks and then would not permit petitioner to respond:

> The Court: I want them to understand that your actions should not be their actions because this is not the way that a court is conducted. This is not the way an officer of a court should conduct itself (sic).

Mr. Taylor: I would respond to you, sir—

The Court: (Interrupting) You're not responding to me on anything.

Mr. Taylor: (Interrupting) Oh yes, I will.

The Court: Yes, you're not, either.

Mr. Taylor: Yes, I will.

The Court: The sentence is on Count One—

Mr. Taylor: (Interrupting) Unless you intend to gag me—

The Court: I'll do that—

Mr. Taylor: (Interposing) My lawyers will respond to you—

The Court: (Interposing) I'll do that, sir.

Mr. Taylor: My lawyers will respond to you, sir.

The Court: You be quiet, or you'll—there will be some more contempts—

Mr. Taylor: (Interrupting) No, you heard what I said.

The Court: I have you on nine counts. First Count, 30 days in jail; Second Count, 60 days in jail; Third Count, 90 days in jail; Fourth Count, six months in jail; Sixth Count, six months in jail; Seventh Count, six months in jail; Eighth Count, one year in jail; Ninth Count, one year in jail, all to run consecutive. Take him away.

Mr. Taylor: We will answer you in court.

The Court: I'd be glad to see you (Appendix, pp. 58-59).

With respect to the substantive charges themselves, petitioner in his main brief has pointed out that there was no proper notice of the individual charges against petitioner and no meaningful opportunity to respond to them. A reading of the record bears out this contention.

But even if the contempt citations were properly imposed, the lack of opportunity at the end of the trial to offer any meaningful response violated due process. Despite the fact that the trial judge may have viewed the conduct giving rise to the charges, there are many matters which the petitioner could have offered in his defense.

(1) He could have tried to show that the conduct did not "block the judge in the performance of his judicial duty," *In re McConnell*, 370 U.S. 230, 236 (1962).

(2) He could have tried to show that there was no intent to obstruct the administration of justice. See, e.g., *United States* v. *Seale*, 461 F.2d 345, 365 (7th Cir. 1972).

(3) He could have tried to show that the judge had confused "offense to [his] sensibilities with obstruction to the administration of justice." *Brown* v. *United States*, 356 U.S. 148, 153 (1958).

(4) He could have tried to persuade the judge not to impose or to reduce the sentence through his exercise of the right of allocution. ". . . the contemnor has normally been given an opportunity to speak in his own behalf in the nature of a right of allocution." *Groppi* v. *Leslie*, 404 U.S. 496, 504 (1972).

A recent Court of Appeals decision has expressly upheld the right of an alleged contemnor to allocution before sentencing. In *Weiss* v. *Burr*, 484 F.2d 973, 984 (9th Cir. 1973), the Court noted:

> The last and most difficult question is whether the trial court's contempt procedures in respect to the three remaining citations infringed Weiss's constitutional right to speak in defense and mitigation before being sentenced. *See Groppi* v. *Leslie*, supra, 404 U.S. at 501. We hold that they did. Due process requires that contemnors such as Weiss, who are not cited *and* simultaneously punished for the purpose of either restoring courtroom decorum or protecting the safety of court officials are entitled to an opportunity for allocution.

The Second Circuit has more recently held that the right of allocution is not enough in a contempt case. There must be a more meaningful opportunity to be heard in mitigation of the offense. In *United States* v. *Wilson and Bryan*, —— F.2d —— (2d Cir. November 28, 1973) the court reversed a summary contempt citation imposed on a witness after an orderly refusal to answer certain questions. To the objection that an adequate hearing was given the alleged contemnors, the court said:

> Nor is the bare "opportunity to be heard" dispositive here since the "hearing" was confined to the matter of sentence. If, however, counsel had been given "a reasonable time for the preparation of the defense" (Fed. R. Crim. P. 42 [b]); she might have marshalled and presented facts in mitigation of the charge. Significantly, the record reveals the possibility of a psychiatric defense, at least for Wilson. Some of Wilson's

psychological problems, disclosed by a court-ordered study, were explored at an abortive sentencing hearing on his guilty plea, preceding the refusal to testify. With respect to that conviction, Judge Lasker concluded: "I do not believe that in this complicated case I have sufficient information before me to permit me justly to proceed to sentence with Mr. Wilson." Shortly thereafter, nonetheless, he proceeded to sentence him for contempt. With additional time to prepare a defense, counsel for Wilson might have enlarged on the issue of appellant's mental health, and perhaps shown a relationship between any psychological difficulties and the refusal to serve as a witness. Finally, because of the posture of the case, the record is silent on other facts which may well exist in defense or mitigation of the charge against both appellants, and which could be properly developed at a plenary hearing.

Speaking more generally, the Advisory Committee on the Judge's Function of the American Bar Association Project on Standards for Criminal Justice has stated:

F.4 Notice of charges and opportunity to be heard

Before imposing any punishment for criminal contempt, the judge should give the offender notice of the charges and at least a summary opportunity to adduce evidence or argument relevant to guilt or punishment.

Commentary

Although there is authority that in-court contempts can be punished without notice of charges or an opportunity to be heard, *Ex parte Terry,* 128 U.S. 289 (1888), such a procedure has little to commend it, is inconsistent with the basic notions of fairness and is

likely to bring disrespect upon the court. Accordingly, notice and at least a brief opportunity to be heard should be afforded as a matter of course. Nothing in this standard, however, implies that a plenary trial of contempt charges is required. Advisory Committee on the Judge's Function of the American Bar Association Project on Standards for Criminal Justice. *The Judge's Role in Dealing with Trial Disruption* 20 (1971).

Since no meaningful hearing was afforded the petitioner, the judgment below must be reversed.

CONCLUSION

For the foregoing reasons, the Association respectfully submits that the judgment below should be reversed.

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